

ASSEMBLY BILL

No. 2337

Introduced by Assembly Member Dickinson

February 24, 2012

An act to amend Section 1985.3 of the Code of Civil Procedure, and to amend Section 1326 of, and to add Section 1326.3 to, the Penal Code, relating to electronic personal records.

LEGISLATIVE COUNSEL'S DIGEST

AB 2337, as introduced, Dickinson. Electronic personal records.

(1) Existing law requires a copy of a subpoena duces tecum for the production of personal records pertaining to a consumer, to be served upon the consumer prior to specified dates, together with a copy of the affidavit supporting the issuance of the subpoena, if any, specified notice, and proof of service. Existing law requires the subpoenaing party either to serve upon the witness who maintains the records proof of personal service of these documents upon the consumer or to furnish the witness with written authorization from the consumer to release the records. Existing law defines “personal records” for purposes of these provisions.

This bill would increase the period of time by which the above-described notice to the consumer and delivery of documents must occur. The bill would require the subpoenaing party either to serve proof of the personal service on the consumer, or to furnish the consumer’s written authorization, within a specified time. The bill would expand the definition of “personal records” for these purposes to include any data pertaining to a consumer that is maintained by an interactive computer service or access software provider, as specified.

(2) Existing law provides that a subpoena duces tecum for personal records pertaining to a consumer that are maintained by a telephone corporation that is a public utility shall not be valid or effective unless it includes a consent to release, signed by the consumer whose records are requested, as specified.

This bill would provide that a subpoena duces tecum for personal records pertaining to a consumer that are maintained by an interactive computer service or access software provider shall not be valid if the court makes any specified finding.

(3) Existing law permits the consumer whose personal records are sought by a subpoena duces tecum pursuant to the above-described provisions, and who is party to the action in which the subpoena is served, to bring a motion to quash or modify the subpoena, as specified. Any other consumer or nonparty whose personal records are sought may serve a written objection that cites the specific grounds on which production of the personal records should be prohibited.

This bill would additionally permit the witness upon whom the subpoena is served to bring such a motion or to serve that written objection.

(4) Under existing law, a subpoena issued in a criminal action that commands the custodian of records or other qualified witness of a business to produce books, papers, documents, or records shall direct that those items be delivered by the custodian or qualified witness in a specified manner.

This bill would make the provisions described in (1), (2), and (3) above apply in a criminal prosecution or proceeding if the subpoena calls for the production of personal records pertaining to a consumer. However, if the personal records are produced by an interactive computer service or access software provider in accordance with those requirements, and are accompanied by a specified declaration, the bill would provide that no witness need appear to testify or otherwise authenticate the records.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1985.3 of the Code of Civil Procedure
2 is amended to read:

1 1985.3. (a) For purposes of this section, the following
2 definitions apply:

3 (1) “Personal records” means the original, any copy of books,
4 documents, other writings, or electronic data pertaining to a
5 consumer and ~~which~~ *that* are maintained by any “witness” ~~which~~
6 ~~is a~~ *that is any of the following*:

7 (A) A physician, dentist, ophthalmologist, optometrist,
8 chiropractor, physical therapist, *psychotherapist, as defined in*
9 *Section 1010 of the Evidence Code*, acupuncturist, podiatrist,
10 veterinarian, veterinary hospital, veterinary clinic, pharmacist,
11 pharmacy, hospital, medical center, clinic, radiology or MRI center,
12 *or clinical or diagnostic laboratory, state.*

13 (B) *A state or national bank, state or federal association (as, as*
14 *defined in Section 5102 of the Financial Code), state or*
15 *federal credit union, trust company, anyone authorized by this state*
16 *to make or arrange loans that are secured by real property, security*
17 *brokerage firm, insurance company, title insurance company,*
18 *underwritten title company, escrow agent licensed pursuant to*
19 *Division 6 (commencing with Section 17000) of the Financial*
20 *Code or exempt from licensure pursuant to Section 17006 of the*
21 *Financial Code, attorney, accountant, or institution of the Farm*
22 *Credit System, as specified in Section 2002 of Title 12 of the*
23 *United States Code, or.*

24 (C) *An attorney or accountant.*

25 (D) *A telephone corporation which that is a public utility, as*
26 *defined in Section 216 of the Public Utilities Code, or*
27 *psychotherapist, as defined in Section 1010 of the Evidence Code,*
28 *or a.*

29 (E) *A private or public preschool, elementary school, secondary*
30 *school, or postsecondary school, as described in Section 76244 of*
31 *the Education Code.*

32 (F) *An interactive computer service or access software provider,*
33 *as defined in Section 230(f) of Title 47 of the United States Code.*

34 (2) “Consumer” means any individual, partnership of five or
35 fewer persons, association, or trust ~~which~~ *that* has transacted
36 business with, or has used the services of, the witness or for ~~whom~~
37 *which* the witness has acted as agent or fiduciary.

38 (3) “Subpoenaing party” means the person or persons causing
39 a subpoena duces tecum to be issued or served in connection with
40 any civil action or proceeding pursuant to this code, but shall not

1 include the state or local agencies described in Section 7465 of
2 the Government Code, or any entity provided for under Article VI
3 of the California Constitution in any proceeding maintained before
4 an adjudicative body of that entity pursuant to Chapter 4
5 (commencing with Section 6000) of Division 3 of the Business
6 and Professions Code.

7 (4) “Deposition officer” means a person who meets the
8 qualifications specified in Section 2020.420.

9 (b) Prior to the date called for in the subpoena duces tecum for
10 the production of personal records, the subpoenaing party shall
11 serve or cause to be served on the consumer whose records are
12 being sought a copy of the subpoena duces tecum, of the affidavit
13 supporting the issuance of the subpoena, if any, and of the notice
14 described in subdivision (e), and proof of service as indicated in
15 paragraph (1) of subdivision (c). This service shall be made as
16 follows:

17 (1) To the consumer personally, or at his or her last known
18 address, or in accordance with Chapter 5 (commencing with
19 Section 1010) of Title 14 of Part 3 2, or, if he or she is a party, to
20 his or her attorney of record. If the consumer is a minor, service
21 shall be made on the minor’s parent, guardian, conservator, or
22 similar fiduciary, or if one of them cannot be located with
23 reasonable diligence, then service shall be made on any person
24 having the care or control of the minor or with whom the minor
25 resides or by whom the minor is employed, and on the minor if
26 the minor is at least 12 years of age.

27 (2) Not less than ~~10~~ 21 days prior to the date for production
28 specified in the subpoena duces tecum, plus the additional time
29 provided by Section 1013 if service is by mail.

30 (3) At least ~~five~~ 10 days prior to service upon the custodian of
31 the records, plus the additional time provided by Section 1013 if
32 service is by mail.

33 (c) Prior to the production of the records, *but not less than 21*
34 *days prior to the date for production specified in the subpoena*
35 *duces tecum*, the subpoenaing party shall do either of the following:

36 (1) Serve or cause to be served upon the witness a proof of
37 personal service or of service by mail attesting to compliance with
38 subdivision (b).

39 (2) Furnish the witness a written authorization to release the
40 records signed by the consumer ~~or by his or her~~ *under oath or by*

1 *the consumer's* attorney of record. The witness may presume that
2 any attorney purporting to sign the authorization on behalf of the
3 consumer acted with the consent of the consumer, and that any
4 objection to release of records is waived. *The witness may require*
5 *additional, reasonable proof of identity or ownership by the*
6 *consumer of the account for which personal records are sought.*

7 (d) A subpoena duces tecum for the production of personal
8 records shall be served in sufficient time to allow the witness a
9 reasonable time, as provided in Section 2020.410, to locate and
10 produce the records or copies thereof.

11 (e) (1) Every copy of the subpoena duces tecum and affidavit,
12 if any, served on a consumer or his or her attorney in accordance
13 with subdivision (b) shall be accompanied by a notice, in a typeface
14 designed to call attention to the notice, indicating ~~that (1) records~~
15 *all of the following:*

16 (A) *Records* about the consumer are being sought from the
17 witness named on the subpoena; ~~(2) if.~~

18 (B) *If* the consumer objects to the witness furnishing the records
19 to the party seeking the records, the consumer must file papers
20 with the court or serve a written objection as provided in
21 subdivision (g) prior to the date specified for production on the
22 subpoena; ~~and (3) if.~~

23 (C) *If* the party who is seeking the records will not agree in
24 writing to cancel or limit the subpoena, an attorney should be
25 consulted about the consumer's interest in protecting his or her
26 rights of privacy. ~~If~~

27 (2) *If* a notice of taking of deposition is also served, that other
28 notice may be set forth in a single document with the notice
29 required by this subdivision.

30 ~~(f) A subpoena duces tecum for personal records maintained by~~
31 ~~a telephone corporation which is a public utility, as defined in~~
32 ~~Section 216 of the Public Utilities Code, shall not be valid or~~
33 ~~effective unless it includes a consent to release, signed by the~~
34 ~~consumer whose records are requested, as required by Section~~
35 ~~2891 of the Public Utilities Code.~~

36 (f) A subpoena duces tecum for personal records shall not be
37 valid if either of the following apply:

38 (1) *The personal records being sought are maintained by a*
39 *telephone corporation that is a public utility, as defined in Section*
40 *216 of the Public Utilities Code, and the subpoena duces tecum*

1 *does not include a consent to release signed by the consumer whose*
2 *records are requested, as required by Section 2891 of the Public*
3 *Utilities Code.*

4 *(2) The personal records being sought are maintained by, and*
5 *the subpoenaed witness is, an interactive computer service or*
6 *access software provider, as defined in Section 230(f) of Title 47*
7 *of the United States Code, and the court makes any of the following*
8 *findings:*

9 *(A) The subpoena duces tecum does not include a written*
10 *authorization to release the records that complies with paragraph*
11 *(2) of subdivision (c) or proof of service attesting to compliance*
12 *with subdivision (b).*

13 *(B) The subpoenaing party has not exhausted all other*
14 *reasonable means for obtaining the personal records.*

15 *(C) The personal records described in the subpoena duces tecum*
16 *are not relevant and material to the underlying proceeding.*

17 *(D) The need for the personal records does not outweigh the*
18 *constitutional and statutory rights of the consumer to personal*
19 *privacy.*

20 *(g) Any consumer whose personal records are sought by a*
21 *subpoena duces tecum and who is a party to the civil action in*
22 *which this subpoena duces tecum is served, or the witness upon*
23 *whom the subpoena duces tecum is served, may, prior to the date*
24 *for production, bring a motion under Section 1987.1 to quash or*
25 *modify the subpoena duces tecum. Notice of the bringing of that*
26 *motion shall be given to the witness and deposition officer at least*
27 *five days prior to production. The failure to provide notice to the*
28 *deposition officer shall not invalidate the motion to quash or*
29 *modify the subpoena duces tecum but may be raised by the*
30 *deposition officer as an affirmative defense in any action for*
31 *liability for improper release of records.*

32 *Any other consumer or nonparty whose personal records are*
33 *sought by a subpoena duces tecum, or the witness upon whom the*
34 *subpoena duces tecum is served, may, prior to the date of*
35 *production, serve on the subpoenaing party, the witness, and the*
36 *deposition officer, a written objection that cites the specific grounds*
37 *on which production of the personal records should be prohibited.*

38 *No witness or deposition officer shall be required to produce*
39 *personal records after receipt of notice that the motion has been*
40 *brought by a consumer, or after receipt of a written objection from*

1 a nonparty consumer, except upon order of the court in which the
2 action is pending or by agreement of the parties, witnesses, and
3 consumers affected.

4 The party requesting a consumer's personal records may bring
5 a motion under Section 1987.1 to enforce the subpoena within 20
6 days of service of the written objection. The motion shall be
7 accompanied by a declaration showing a reasonable and good faith
8 attempt at informal resolution of the dispute between the party
9 requesting the personal records and the consumer or the consumer's
10 attorney.

11 (h) Upon good cause shown, and ~~provided that~~ *if* the rights of
12 witnesses and consumers are preserved, a subpoenaing party shall
13 be entitled to obtain an order shortening the time for service of a
14 subpoena duces tecum or waiving the requirements of subdivision
15 (b) ~~where~~ *when* due diligence by the subpoenaing party has been
16 shown.

17 (i) Nothing contained in this section shall be construed to apply
18 to any subpoena duces tecum ~~which~~ *that* does not request the
19 records of any particular consumer or consumers, and ~~which~~ *that*
20 requires a custodian of records to delete all information ~~which~~ *that*
21 would in any way identify any consumer whose records are to be
22 produced.

23 (j) This section shall not apply to proceedings conducted under
24 Division 1 (commencing with Section 50), Division 4 (commencing
25 with Section 3200), Division 4.5 (commencing with Section 6100),
26 or Division 4.7 (commencing with Section 6200), of the Labor
27 Code.

28 (k) Failure to comply with this section shall be sufficient basis
29 for the witness to refuse to produce the personal records sought
30 by a subpoena duces tecum.

31 (l) If the subpoenaing party is the consumer, and the consumer
32 is the only subject of the subpoenaed records, notice to the
33 consumer, and delivery of the other documents specified in
34 subdivision (b) to the consumer, is not required under this section.

35 SEC. 2. Section 1326 of the Penal Code is amended to read:

36 1326. (a) The process by which the attendance of a witness
37 before a court or magistrate is required is a subpoena. It may be
38 signed and issued by any of the following:

1 (1) A magistrate before whom a complaint is laid or his or her
2 clerk, the district attorney or his or her investigator, or the public
3 defender or his or her investigator, for witnesses in the state.

4 (2) The district attorney, his or her investigator, or, upon request
5 of the grand jury, any judge of the superior court, for witnesses in
6 the state, in support of an indictment or information, to appear
7 before the court in which it is to be tried.

8 (3) The district attorney or his or her investigator, the public
9 defender or his or her investigator, or the clerk of the court in which
10 a criminal action is to be tried. The clerk shall, at any time, upon
11 application of the defendant, and without charge, issue as many
12 blank subpoenas, subscribed by him or her, for witnesses in the
13 state, as the defendant may require.

14 (4) The attorney of record for the defendant.

15 (b) ~~A~~ *Except as otherwise provided in Section 1326.3, a*
16 subpoena issued in a criminal action that commands the custodian
17 of records or other qualified witness of a business to produce books,
18 papers, documents, or records shall direct that those items be
19 delivered by the custodian or qualified witness in the manner
20 specified in subdivision (b) of Section 1560 of the Evidence Code.
21 Subdivision (e) of Section 1560 of the Evidence Code shall not
22 apply to criminal cases.

23 (c) ~~In~~ *Except as otherwise provided in Section 1326.3, in a*
24 criminal action, no party, or attorney or representative of a party,
25 may issue a subpoena commanding the custodian of records or
26 other qualified witness of a business to provide books, papers,
27 documents, or records, or copies thereof, relating to a person or
28 entity other than the subpoenaed person or entity in any manner
29 other than that specified in subdivision (b) of Section 1560 of the
30 Evidence Code. ~~When~~ *If a defendant has issued a subpoena to a*
31 person or entity that is not a party for the production of books,
32 papers, documents, or records, or copies thereof, the court may
33 order an in camera hearing to determine whether or not the defense
34 is entitled to receive the documents. The court may not order the
35 documents disclosed to the prosecution except as required by
36 Section 1054.3.

37 (d) This section shall not be construed to prohibit obtaining
38 books, papers, documents, or records with the consent of the person
39 to whom the books, papers, documents, or records relate.

40 SEC. 3. Section 1326.3 is added to the Penal Code, to read:

1 1326.3. (a) For purposes of this section, the following
2 definitions apply:

3 (1) “Personal records” means the original, any copy of books,
4 documents, other writings, or electronic data pertaining to a
5 consumer and that are maintained by any “witness” that is any of
6 the following:

7 (A) A physician, dentist, ophthalmologist, optometrist,
8 chiropractor, physical therapist, psychotherapist, as defined in
9 Section 1010 of the Evidence Code, acupuncturist, podiatrist,
10 veterinarian, veterinary hospital, veterinary clinic, pharmacist,
11 pharmacy, hospital, medical center, clinic, radiology or MRI center,
12 or clinical or diagnostic laboratory.

13 (B) A state or national bank, state or federal association, as
14 defined in Section 5102 of the Financial Code, state or federal
15 credit union, trust company, anyone authorized by this state to
16 make or arrange loans that are secured by real property, security
17 brokerage firm, insurance company, title insurance company,
18 underwritten title company, escrow agent licensed pursuant to
19 Division 6 (commencing with Section 17000) of the Financial
20 Code or exempt from licensure pursuant to Section 17006 of the
21 Financial Code, or institution of the Farm Credit System, as
22 specified in Section 2002 of Title 12 of the United States Code.

23 (C) An attorney or accountant.

24 (D) A telephone corporation that is a public utility, as defined
25 in Section 216 of the Public Utilities Code.

26 (E) A private or public preschool, elementary school, secondary
27 school, or postsecondary school, as described in Section 76244 of
28 the Education Code.

29 (F) An interactive computer service or access software provider,
30 as defined in Section 230(f) of Title 47 of the United States Code.

31 (2) “Consumer” means any individual, partnership of five or
32 fewer persons, association, or trust that has transacted business
33 with, or has used the services of, the witness or for which the
34 witness has acted as agent or fiduciary.

35 (3) “Subpoenaing party” means the person or persons causing
36 a subpoena duces tecum to be issued or served in connection with
37 any criminal prosecution or proceeding pursuant to this code, but
38 shall not include the state or local agencies described in Section
39 7465 of the Government Code, or any entity provided for under
40 Article VI of the California Constitution in any proceeding

1 maintained before an adjudicative body of that entity pursuant to
2 Chapter 4 (commencing with Section 6000) of Division 3 of the
3 Business and Professions Code.

4 (4) “Deposition officer” means a person who meets the
5 qualifications specified in Section 2020.420 of the Code of Civil
6 Procedure.

7 (b) Prior to the date called for in the subpoena duces tecum for
8 the production of personal records, the subpoenaing party shall
9 serve or cause to be served on the consumer whose records are
10 being sought a copy of the subpoena duces tecum, of the affidavit
11 supporting the issuance of the subpoena, if any, and of the notice
12 described in subdivision (e), and proof of service as indicated in
13 paragraph (1) of subdivision (c). This service shall be made as
14 follows:

15 (1) To the consumer personally, or at his or her last known
16 address, or in accordance with Chapter 5 (commencing with
17 Section 1010) of Title 14 of Part 2 of the Code of Civil Procedure,
18 or, if he or she is a party, to his or her attorney of record. If the
19 consumer is a minor, service shall be made on the minor’s parent,
20 guardian, conservator, or similar fiduciary, or if one of them cannot
21 be located with reasonable diligence, then service shall be made
22 on any person having the care or control of the minor or with whom
23 the minor resides or by whom the minor is employed, and on the
24 minor if the minor is at least 12 years of age.

25 (2) Not less than 21 days prior to the date for production
26 specified in the subpoena duces tecum, plus the additional time
27 provided by Section 1013 of the Code of Civil Procedure if service
28 is by mail.

29 (3) At least 10 days prior to service upon the custodian of the
30 records, plus the additional time provided by Section 1013 of the
31 Code of Civil Procedure if service is by mail.

32 (c) Prior to the production of the records, but not less than 21
33 days prior to the date for production specified in the subpoena
34 duces tecum, the subpoenaing party shall do either of the following:

35 (1) Serve or cause to be served upon the witness and the
36 prosecuting authority a proof of personal service or of service by
37 mail attesting to compliance with subdivision (b).

38 (2) Furnish the witness and the prosecuting authority a written
39 authorization to release the records signed by the consumer under
40 oath or by the consumer’s attorney of record. The witness may

1 presume that any attorney purporting to sign the authorization on
2 behalf of the consumer acted with the consent of the consumer,
3 and that any objection to release of records is waived. The witness
4 may require additional, reasonable proof of identity or ownership
5 by the consumer of the account for which personal records are
6 sought.

7 (d) A subpoena duces tecum for the production of personal
8 records shall be served in sufficient time to allow the witness a
9 reasonable time, as provided in Section 2020.410 of the Code of
10 Civil Procedure, to locate and produce the records or copies thereof.

11 (e) (1) Every copy of the subpoena duces tecum and affidavit,
12 if any, served on a consumer or his or her attorney in accordance
13 with subdivision (b) shall be accompanied by a notice, in a typeface
14 designed to call attention to the notice, indicating all of the
15 following:

16 (A) Records about the consumer are being sought from the
17 witness named on the subpoena.

18 (B) If the consumer objects to the witness furnishing the records
19 to the party seeking the records, the consumer must file papers
20 with the court or serve a written objection as provided in
21 subdivision (g) prior to the date specified for production on the
22 subpoena.

23 (C) If the party who is seeking the records will not agree in
24 writing to cancel or limit the subpoena, an attorney should be
25 consulted about the consumer's interest in protecting his or her
26 rights of privacy.

27 (2) If a notice of taking of deposition is also served, that other
28 notice may be set forth in a single document with the notice
29 required by this subdivision.

30 (f) A subpoena duces tecum for personal records shall not be
31 valid if either of the following apply:

32 (1) The personal records being sought are maintained by a
33 telephone corporation that is a public utility, as defined in Section
34 216 of the Public Utilities Code, and the subpoena duces tecum
35 does not include a consent to release signed by the consumer whose
36 records are requested, as required by Section 2891 of the Public
37 Utilities Code.

38 (2) The personal records being sought are maintained by, and
39 the subpoenaed witness is, an interactive computer service or access
40 software provider, as defined in Section 230(f) of Title 47 of the

1 United States Code, and the court makes any of the following
2 findings:

3 (A) The subpoena duces tecum does not include a written
4 authorization to release the records that complies with paragraph
5 (2) of subdivision (c) or proof of service attesting to compliance
6 with subdivision (b).

7 (B) The subpoenaing party has not exhausted all other
8 reasonable means for obtaining the personal records.

9 (C) The personal records described in the subpoena duces tecum
10 are not relevant and material to the underlying proceeding.

11 (D) The need for the personal records does not outweigh the
12 constitutional and statutory rights of the consumer to personal
13 privacy.

14 (g) Any consumer whose personal records are sought by a
15 subpoena duces tecum and who is a defendant in the criminal
16 proceeding in which the subpoena duces tecum is served, or the
17 witness upon whom the subpoena duces tecum is served, may,
18 prior to the date for production, bring a motion under Section
19 1987.1 of the Code of Civil Procedure to quash or modify the
20 subpoena duces tecum. Notice of the bringing of that motion shall
21 be given to the witness and deposition officer at least five days
22 prior to production. The failure to provide notice to the deposition
23 officer shall not invalidate the motion to quash or modify the
24 subpoena duces tecum, but may be raised by the deposition officer
25 as an affirmative defense in any action for liability for improper
26 release of records.

27 Any other consumer whose personal records are sought by a
28 subpoena duces tecum, or the witness upon whom the subpoena
29 duces tecum is served, may, prior to the date of production, serve
30 on the subpoenaing party, the witness, and the deposition officer,
31 a written objection that cites the specific grounds on which
32 production of the personal records should be prohibited.

33 No witness or deposition officer shall be required to produce
34 personal records after receipt of notice that the motion has been
35 brought by a consumer, or after receipt of a written objection from
36 a consumer, except upon order of the court in which the prosecution
37 or proceeding is pending or by agreement of the parties, witnesses,
38 and consumers affected.

39 The party requesting a consumer's personal records may bring
40 a motion under Section 1987.1 of the Code of Civil Procedure to

1 enforce the subpoena within 20 days of service of the written
2 objection. The motion shall be accompanied by a declaration
3 showing a reasonable and good faith attempt at informal resolution
4 of the dispute between the party requesting the personal records
5 and the consumer or the consumer's attorney.

6 (h) Upon good cause shown, and if the rights of witnesses and
7 consumers are preserved, a subpoenaing party shall be entitled to
8 obtain an order shortening the time for service of a subpoena duces
9 tecum or waiving the requirements of subdivision (b) when due
10 diligence by the subpoenaing party has been shown.

11 (i) Nothing contained in this section shall be construed to apply
12 to any subpoena duces tecum that does not request the records of
13 any particular consumer or consumers, and that requires a custodian
14 of records to delete all information that would in any way identify
15 any consumer whose records are to be produced.

16 (j) Failure to comply with this section shall be sufficient basis
17 for the witness to refuse to produce the personal records sought
18 by a subpoena duces tecum.

19 (k) If personal records are produced by an interactive computer
20 service or access software provider in accordance with subdivisions
21 (b), (c), and (f), and are accompanied by a declaration under
22 Section 1561 of the Evidence Code, no witness need appear to
23 testify or otherwise authenticate the records.